NO. 82-1032

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,

Petitioner

VERSUS

DIAMOND M DRILLING COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

PERIODICALS:

ARGUMENT

I. THE MOST RECENT SECTION 905(b) DECISION OF THE FIFTH CIRCUIT EXEMPLIFIES ITS INTRACTABLE RESOLVE TO APPLY THE OUTMODED CONCEPTS OF THE RESTATEMENT OF TORTS (OR CONTRACTS) TO THESE CASES IN DEFIANCE OF THIS COURT'S PRECISE HOLDING IN SCINDIA STEAM NAVIGATION CO. V. DE LOS SANTOS.

The recently reported case of *Moser v. Texas Trailer Corp.*, 694 F.2d 96 (5th Cir. 1982) (Summary Calendar) exemplifies the intractable resolve of the Fifth Circuit to apply the outmoded concepts of the Restatement of Torts (or Contracts!) to Section 905(b) cases in defiance of this Court's precise holding in *Scindia Steam Navigation Co. v. De Los Santos,*[1] where this Court said:

> "it is urged that the District Court properly turned to and applied §§343 and 343A of the Restatement (Second) of Torts. But the legislative history does not refer to the Restatement and also states that *land-based principles of assumption of risk and contributory negligence are not to be applied in §905(b) cases. This strongly suggests, as Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959), indicated, *that maritime negligence actions are not necessarily to be governed by principles applicable in non-maritime contexts. Furthermore, since the lower courts are not only in disagreement as to the applicability of §§343 and 343A* but also to their impact and meaning when applied to the maritime context, *those sections,* while not irrelevant, *do not furnish sure guidance in cases such as this.*

[1] 451 U.S. 156, 168, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), h. 14.

Thus in very restrained language this Court politely told the Fifth Circuit not to use archaic Restatement principles in §905(b) cases. This wise counsel was doubtless motivated by this Court's recognition that a compilation by esteemed law professors of their consensus as to what tort law should be in the 50 states of our Union in 1965 was a poor vehicle for developing negligence standards under a federal maritime law passed in 1972 being applied to cases in the 1980's.

This Court in *Scindia* tacitly recognized that when Congress passed the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, it relegated injured maritime workers to a "negligence" action with a distinct maritime flavor but identical to the injured land based worker's right of action in one important respect—the maritime worker no longer enjoyed the right to sue the shipowner for liability without fault under the doctrine of unseaworthiness. Consequently, the *Scindia* decision precisely delineates those circumstances under which the shipowner would be guilty of §905(b) negligence for *dangerous conditions*, such as the defective ship's winch aboard *Scindia's* vessel, which *conditions* would have been labelled unseaworthiness prior to the 1972 Amendments.

On the other hand, *Scindia* forthrightly says in a manner understandable to even the most obtuse reader that the shipowner's liability for cases of *operational negligence* is different from his liability for unseaworthy conditions, when it says: "*It is accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equip-*

ment, under the active control of the vessel during the stevedoring operations. 451 U.S. at 167. In thus defining operational negligence this Court avowedly adhered to its well-established definition of general maritime law negligence declared in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) where a passenger who fell on a defective stairway recovered for shipowner negligence and this Court "adopted a single duty of '*exercising reasonable care under the circumstances of each case,*' rather than to incorporate in the maritime law the complexities of the common law of invitee and licensee. *Id.* at 632,..."[2] Moreover, "The Kermarec standard was reaffirmed in Marine Terminals v. Burnside Shipping Co., 394 U.S. 404, 22 L.Ed. 371, 89 S.Ct. 1144 (1969), a case involving a suit by the stevedore against the shipowner..." where this Court held "that the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' "[3]

Simple as the *Scindia* rationale seems, the Fifth Circuit has demonstrated again in *Moser* that it has either totally misinterpreted this Court's position or has decided to thwart this Court's will by covertly reinstating its own pre-*Scindia* Restatement standard of negligence, while rendering ritualistic semantic homage to *Scindia.* In *Moser,* the defendant shipowner Crescent Petroleum Corporation purchased a housing module to be used by its employees as quarters during their work on an oil drilling project in the Persian Gulf. Crescent hired someone else to load the module on a barge chartered by Crescent as owner *pro hac vice.* The loading contractor removed *two 3x6*-foot

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[2] *Scindia Steam Navigation Co. v. De Los Santos, supra,* 451 U.S. at 163, n. 10.

[3] *Id.,* 451 U.S. 163, n. 10; 166.

floor gratings from a second floor grating and did not replace them after the module had been loaded. The plaintiff, an engineer hired by Crescent to help with the construction of its Persian Gulf project, was asked by Crescent to observe the loading of the module and report any damage to the shipowner. While carrying out his duties, he predictably fell through the hole in the walkway and suffered injuries which the trial judge assessed at $511,000. The trial court rendered judgment against the loading contractor (presumably impecunious), the designer of the module and Crescent. In its initial review of the case, the Fifth Circuit reversed the judgment against the module designer and Crescent and remanded the case for a determination of Crescent's liability under §905(b). The Fifth Circuit's pre-*Scindia* opinion was replete with references to the Restatement of Torts standards to be applied and said:

> "Since Moser's claim against Crescent as owner of the module is a maritime negligence action rather than a suit under LHWCA, federal maritime law applies. However, '*general maritime law incorporates the general law of torts when not inconsistent with the law of admiralty.* [Citing 5th Circuit cases but no United States Supreme Court Cases]. Accordingly, *we turn to the general law of torts to determine the duties of an employer of an independent contractor under the circumstances presented in this case.* See *McCormack v. Noble Drilling Corp.*, 608 F.2d 169, 17475 (5th Cir. 1979)." *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1014-1015 (5th Cir. 1980).

The Court then found that Crescent owed Moser no duty for the negligence of its contractors because of principles contained in Sections 414 of the *Restatement (Second) of Contracts* (1965) and 412 of the *Restatement Second of Torts (1965).* The *McCormack* case cited by the Court had

specifically relied on Restatement (Second) of Torts §409, §414 to hold that Chevron owed no duty to ensure that its independent contractors performed their work safely in offshore oilfield casing operations. 608 F.2d at 174-175.

An ingenuous observer might have anticipated that the Court's issuance of the *Scindia* decision between the time *Mosher* first came up to the Fifth Circuit in 1980 and the time *Moser returned to the Fifth Circuit in 1982 would, at the minimum, have resulted in a total removal of pre-Scindia* Fifth Circuit Restatement reasoning and precedents from its second *Moser* opinion. However, such an unsophisticated observer should have felt forebodings when the Fifth Circuit declared in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1247 (5th Cir. 1982) "THAT *SCINDIA* DID NOT CHANGE THE LAW IN THIS CIRCUIT AS RELATED TO THE SITUATION PRESENTED BY *PLUYER*" (i.e. a defective ship's ladder), and that his expectations were naive. The *Doucet*[4] decision upon which this writ is based confirmed the Fifth Circuit's dogged adherence to "assumption of the risk" reasoning *a la* Restatement of Torts. All hope that *Scindia* has affected a change of heart in the Fifth Circuit is totally obliterated by *Moser* where the Court held that Crescent:

> "owed Mr. Moser no duty-absent a *peculiarly unreasonable risk of physical harm**--to discover and remedy hazards created by the contractors. 623 F.2d at 1015. We remanded the case, however, "for a determination of Crescent's

[4] *Doucet v. Diamond M Drilling Company*, 683 F.2d 886 (5th Cir. 1982).

* Emphasis by the writer. Query: if a 3x6 foot hole in a walkway does not create "a peculiarly unreasonable risk of physical harm" to a maritime workman, what does? Perchance a cobra asleep in a hole?

status as owner of the vessel and any attendant duties under 905(b)." Id. at 1016.

On remand the district court assumed rather than finding *that Crescent was the shipowner and that the condition in the* module was a dangerous condition in the vessel itself. Even so, the court held that Crescent breached no duty it owed Mr. Moser since his injury was caused by a transitory condition of which it had no knowledge, created by independent contractors over whom it retained no control. We affirm that holding for the reasons stated in our former opinion. See also *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981), cert. denied, 454 U.S. 818, 102 S.Ct. 96, 70 L.Ed.2d 87 (1981); *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236 (5th Cir. 1981), cert. denied, 454 U.S. 816, 102 S.Ct. 386, 70 L.Ed.2d 85 (1981).

The liability as to third persons provided by 33 U.S.C. §905(b) is one for negligence. Since Scindia, at all events, *it is clear that this liability is no more than, if as, extensive as that subsisting under "the general law of torts."* Under that law, we held on the former opinion that no duty was owed Mr. Moser by Crescent. It follows that none was owed him under §905(b)." 694 F.2d at 97-98.

Given this Court's holding in *Scindia* that the general maritime negligence standard is applicable to cases of operational negligence under §905(b) and the "the general law of torts" as expressed in the Restatement is inapplicable to §905(b) cases, this Court will no doubt be astonished by the heedlessness of the Fifth Circuit's unwarranted conclusion that the §905(b) negligence liability "*is no more than, if as,* extensive as that subsisting under

'the general law of torts.' " Brazen disregard for the controlling decision of this Court is exemplified by the Fifth Circuit's citation as controlling precedent of two of its own pre-*Scindia* decisions. *Guidry v. Continental Oil Co., supra,* involved a situation where the shipowner placed pipe on the floor contrary to normal practice, contributing to an injury to a casing crew worker. The Fifth Circuit held: "If location of some of the tools *afforded some obstacle* to a safe performance of the work, the condition was perfectly apparent to all..." 640 F.2d. at 532. Assumption of the risk as forbidden by *Scindia,* n'est pas?

In *Mallard v. Aluminum Company of Canada, Ltd., supra,* boards provided by the shipowner cracked under the wheel of a forklift which toppled over paralyzing plaintiff from the chest down. Plaintiff had allegedly warned the shipowner the boards were dangerous and voids beneath the boards were 1½ by 2 feet rather than the normal 6 inches. The Fifth Circuit said the injured employee could not recover if his stevedore employer "was in a better position to appreciate fully the hazard and avoid the danger," 634 F.2d at 245, citing as its authority Restatement of Torts (Second) §343A (1965) as explained and applied to §905(b) cases in the Fifth Circuit's then leading case of *Gay v. Ocean Transport & Trading, Ltd.,* 546 F.2d 1233 (5th Cir. 1977).

The message of *Moser* is clear. In the eyes of the Fifth Circuit, the Restatement still lives in §905(b) cases. But *Scindia* will now be cited as authority for application of the convuluted licensee--invitee distinctions and assumption of risk principles of the Restatement of Torts to §905(b), as well as for the application of the torturous distinctions between the shipowner's responsibilities to injured third persons for dangerous conditions created by his

independent contractor's employees rather than by the shipowner's own employees under the Restatement of Contracts. It is a puzzle how the Restatement of Torts, rather than the simple *Kermarec* first semester maritime tort principles of "due care under the circumstances" ever got applied to §905(b) cases; but it is an absolute mystery how the Restatement of Contracts ever got involved in §905(b) decisions.

Only one answer suggests itself from a careful review of the 33 §905(b) cases now decided by the Fifth Circuit (the 32 cases digested in the appendix to Doucet's writ application plus *Moser*). Only blatant acts of gross or admitted negligence bordering on willful intent to injure will justify recovery by a §905(b) litigant in the Fifth Circuit. Of the nine post-*Scindia* cases where a §905(b) worker's rights were finally determined, there were only two workers who recovered: (a) In *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1234 (5th Cir. 1982) the ship's captain admitted the ladder which fell with plaintiff was defective (however, the plaintiff was still held to be 40% contributorily negligent); and (b) In *Chiasson v. Rogers Terminal and Shipping Corporation*, 679 F.2d 410 (5th Cir. 1982) the shipowners employees dumped several tons of grain on plaintiff.

II. THE FIFTH CIRCUIT'S APPROACH INSURES THAT EVERY SECTION 905(b) JUDGMENT ADVERSE TO THE SHIPOWNER WILL BE APPEALED.

The F.E.L.A. was enacted in 1908. 35 Stat. 65. The Jones Act was enacted in 1920. 41 Stat. 1007. Between 1911 and 1956, this Court rendered 125 decisions relating to the sufficiency of evidence in jury verdicts under the

F.E.L.A. alone plus countless decisions dealing with the sufficiency of evidence to support Jones Act verdicts.[5] Then this Court stemmed the tide of jury verdict appeals in Jones Act and F.E.L.A. cases in 1957 by holding in *Rogers v. Missouri Pacific Railroad Co., supra,* 352 U.S. 500, 506: "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death...[I]f that test is met [judges] are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities."

It is a cliche' of maritime practice that appeal of an adverse Jones Act jury verdict is almost always futile and a responsible lawyer advises his client of this fact of life. Thus, most Jones Act cases are settled finally before or after a jury verdict is rendered. However, under current Fifth Circuit jury verdict review practice and with at least three conflicting standards being applied by various federal circuits to determine whether a motion for directed verdict or judgment n.o.v.[6] was improvidently denied, any competent counsel for a losing shipowner must counsel his client to appeal in effect to re-try the facts in the Court of Appeals. Not only does such a situation do mortal violence to the Seventh Amendment to the United States Constitution, it is sure to inundate the already overloaded federal appellate Court system with §905(b) appeals.

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[5] *Rogers v. Missouri P.R.Co.*, 352 U.S. 500, 548, 77 S.Ct. 443, 1 L.Ed.2d 493, 543 (1957) (Justice Frankfurter, dissent).

[6] *Schwimmer v. Sony Corp.*, __ U.S. __, 103 S.CT. Rep. 362, 364 __ L.Ed.2d __ (1982) (Justice White, Dissent from Denial of Writ).

CONCLUSION

On February 6, 1983, Chief Justice Warren Burger told the mid-winter convention of the American Bar Association that with the crushing Supreme Court workload "only fundamental changes...will avoid a breakdown of the system—or of some of the individual judges."[7] In this emergency context it is Kafkaesque for federal courts of appeals to be re-trying the facts of maudane personal injury trials. No fair minded person could read the Fifth Circuit's opinion in Doucet without realizing they re-tried the facts. If a manifest injustice had been done to Diamond M, does it not stand to reason that an able impartial federal district judge who heard all the evidence would *at least* have granted Diamond M's Motion for a new trial—which he denied?

When Hammurabi first posted the written laws of Babylon in the marketplace almost 4,000 years ago, his aim was to inform the citizenry of what the lawwas so that they could know what rules their sovereign required them to obey and what their legal rights were as citizens. In our society only a decision of this Court can perform the function of Hammurabi's Code in clearly informing all §905(b) litigants and *all* the federal circuit courts of Appeal that there is one uniform national standard of operational negligence under §905(b) and one uniform national standard of §905(b) review of jury verdicts which must be uniformly applied by all federal circuit courts.

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[7] Baton Rouge, *Morning Advocate*, Feb. 7, 1983, p. 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing has this day been forwarded to all attorneys of record by depositing same in the United States mail, postage prepaid, and properly addressed to the said attorneys, this 12th day of February, 1983.

I. Jackson Burson, Jr.